IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 29 of 2004
with
CRIMINAL APPEAL No.142 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DAVE NILESHKUMAR BHARATBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

CRIMINAL APPEAL NO. 29 OF 2004
MR RAJESH M AGRAWAL for Appellant(s) : 1
MR. K.T.DAVE, APP for Respondent(s) : 1,

CRIMINAL APPEAL NO. 142 OF 2004
MR RAJESH M AGRAWAL with MADHUBEN SHARMA for Appellant(s) : 1
MR. K.T.DAVE, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 06/03/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in these two appeals filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 6.11.2003 rendered in Special (NDPS) Case No. 1 of 2003 by the learned Special Judge, Fast Track Court, Patan, by which the appellants of both the appeals – original accused No. 2 and 1 respectively (“the Accused” for short) have been convicted for commission of the offences punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 ('NDPS Act' for short) and are sentenced to suffer RI for 10 years and fine of Rs.1 lac, i.d., R.I. for 2 years.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under:

2.1 That PW-1, H.R.Zala, PSI, LCB, Patan and PW-10, Karamsinhbhai Kursinhbhai Desai, PI, LCB, Patan, were in the office on

11.11.2002. They received a secret information that Thakore Galabji Chatarji and Dave Nileshkumar Bharatbhai, residing at Harij, were to come with “Ganja” in a plastic bags and that they were to come by S.T. Bus of Surat-Delmal at about 19:05 hours at the S.T.Bus Station, Chanasma. So, after completing the legal formalities, PW-10, Karamsinhbhai Kursinhbhai Desai, PI, LCB, Patan and PW-1, H.R.Zala, PSI, LCB, Patan, along with the members of the raiding party and two panchas, rushed to the ST Bus Station, Chanasma, Taluka Harij. At about 19:05 hours, the S.T. Bus bearing the board of Surat-Delmal came to the platform no.6 of Chanasma S.T. Depot, So the members of the raiding party rushed to the said Bus and opened the door of the Bus but they did not see the accused persons alighting from the bus. So all the persons of the said raiding party entered the Bus and found the accused persons sitting on the front side of the Bus. They reached near the accused persons and informed them that they have got specific information that they have possessed the contraband article Ganja, and as such the raiding party wanted to search the accused persons. At that time, PW-10 K.K.Desai also asked the accused persons as to whether they wanted to be searched in the presence of the

Executive Magistrate or the gazetted officer. The accused persons declined to call the Executive Magistrate or the Gazetted Officer and gave the option that PW-10 K.K.Desai can search them. Thereafter, both the accused were searched in the presence of panch witnesses. During search one plastic bag was found between the two seats on which both the accused were sitting. Thereafter, the raiding party searched the plastic bags and found bluish coloured leaves and sticks, and Ganja was found in the plastic bag. Preliminary test was carried out and it was confirmed that the said leaves and sticks were the contraband article Ganja.

2.2 As per the further case of the prosecution, the said leaves and sticks of Ganja weighed 2 Kg. 630 grams, the value of which was assessed to Rs.5/- per 1 gram. Thus the value of the Ganja was valued at Rs.23,150/-. Two samples weighing 10 gms each were taken out and both the samples were kept in two separate plastic bags and thereafter the same were placed in a cloth which was stitched and thereafter the slip bearing signature of both the panchas as well as the complainant was placed on both the samples, and seal of PI, LCB, Patan was affixed on both the samples, which were given Mark-A1 and A2. The panchnama of seizure was

prepared and both the accused were arrested.

2.3 A complaint for the aforesaid incident was lodged by PW-1 H.R.Zala against the accused, for commission of the offence punishable under the NDPS Act, before the LCB Patan, which was registered by PW-10 K.K.Desai, PSI of Patan, at LCB Police Station vide CR No. 171/2002.

2.4 Pursuant to the registration of the complaint against the accused persons, PW-11 Jagannath Ramlakhan Parekhm, IO took over the investigation. During the course of investigation, he recorded the statements of the witnesses and sent the muddamal to FSL for analysis. On receipt of the report from the FSL, it is certified that the muddamal sent for FSL was Ganja, and, as sufficient incriminating evidence was found against the accused persons for commission of the offence punishable under the NDPS Act, PW-11 Jagannath Ramlakhan Parekh, IO filed charge sheet against the accused persons in the Court of learned JMFC, Chanasma.

2.5 As the offence under the NDPS Act is exclusively triable by the Court of Sessions, the learned JMFC, Chanasma committed the case to the Sessions Court of Patan.

2.6 On committal, the learned Special Judge,

Fast Track Court, Patan, to whom the case was made over for trial, framed charge against both the accused for commission of the offence punishable under Section 20(b) of the NDPS Act. The charge was read over and explained to both the accused.

2.7 The accused persons pleaded not guilty to the charge and claimed to be tried. They were tried in Special NDPS Case No. 1 of 2003.

2.8 To prove the culpability of the accused, the prosecution has examined in all 12 witnesses and relied upon their oral testimonies, the details of which have been given in para 9 of the impugned judgment and order.

2.9 In order to prove the charge levelled against the accused, the prosecution has also produced in all 29 documents and relied upon the contents thereof, the details of which have been narrated in paragraph 10 of the impugned judgment and order.

2.10 After recording of the evidence of the prosecution witnesses was over, the trial Court, explained to both the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement under

Section 313 of the Code. In their further statement they denied the case of the prosecution in toto. They have stated that they have been falsely implicated in the case. They have not committed any offence. However, they have neither led any evidence nor examined any witness to support their defence.

2.11 On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution beyond reasonable doubt that when both the accused were intercepted and apprehended, they were found in possession of 2 kg 630 grams of Ganja. Therefore, complicity of both the accused for commission of the offence under the NDPS Act, has been proved. It is also held that as per notification, 100 gram quantity of Ganja is a small quantity whereas quantity of 1 kg. Of Ganja is a commercial quantity. From both the accused, 2kg, 630 grams of Ganja was found. Therefore, they were found with the commercial quantity. Therefore, accused were held guilty for commission of the offence punishable under Section 20(b)(ii)(C) of the NDPS Act and accordingly, both of them are sentenced to suffer RI for 10 years and fine of Rs. 1 lac i.d. RI for 2 years, giving rise to these two appeals; one being Criminal

Appeal No. 29 of 2004 filed by A-2 and the another being Criminal Appeal No. 142 of 2004 filed by A-1.

3. Mr. R.M.Agarwal, the learned advocate of the accused in both the appeals, at the outset submitted that he does not challenge the order of conviction on merits. However, he challenges the order of sentence. According to him, the trial Court has held that the quantity of 100 gram Ganja is a small quantity whereas quantity of 1Kg Ganja is a commercial quantity, is not correct. According to him, as per the notification dated 19.10.2001, at Item No. 55, small quantity and commercial quantity of Ganja is mentioned as 1000 grams, i.e. 1Kg of Ganja is a small quantity, whereas 20 Kg of Ganja is a commercial quantity. So far as both the accused are concerned, 2kg 630 grams of Ganja was jointly recovered from them, therefore, the accused ought to have been convicted and sentenced under Clause 20(b)(ii)(B) of the NDPS Act, whereby the benefit of the rationalized sentencing structure has been given to the accused. As per the said notification, the accused ought to have been sentenced for commission of the offence for possessing narcotic drug weighing less than commercial quantity, where the maximum punishment is RI for 10 years. The accused

are in jail for more than 4 years and 3 months, therefore, benefit of the rationalized sentencing structure under the NDPS Act should be given to the accused and the period of imprisonment undergone by both the accused may be treated as substantive sentence. Therefore, he urged that while upholding the order of conviction for commission of the offence, recorded against both the accused, under Section 20(b)(ii)(C) under the NDPS Act, may be altered into conviction recorded under Section 20(b)(ii)(B) of the NDPS Act, and sentence may be altered by reducing the sentence undergone by both the accused, and the appeal may be partly allowed accordingly. He, therefore, urged to allow the appeal qua altering the conviction and sentence.

4. Mr. K.T.Dave, the learned APP for respondent no.1 – State of Gujarat in both the appeals, has candidly submitted that, it is true that the quantity of 1Kg Ganja is a small quantity whereas quantity of 20 Kg. Ganja is a commercial quantity. From the accused persons, 2 Kg 630 grams of Ganja was recovered, therefore, they were found in possession of Ganja of less then commercial quantity, therefore, they ought to have been convicted and sentenced under Section 20(b)(ii)(B) of the NDPS Act. In the instant

case, trial Court convicted and sentenced them under Section 20(b)(ii)(C) of the NDPS Act, which is for commercial quantity. He, therefore, urged that the appropriate order, altering the conviction and sentence may be passed as deemed fit by this Court. He, therefore urged to pass appropriate orders.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. Since Mr. R.M.Agarwal, learned advocate for the accused persons, has not challenged

the order of conviction on merits, recorded against the accused persons, this Court has to examine the sole contention as to whether the trial Court has rightly convicted and sentenced both the accused, under Section 20(b)(ii)(C) of the NDPS Act and sentenced both the accused considering the quantity of the contraband article Ganja recovered from both the accused, weighing 2 Kg. 630 grams.

7. There is no dispute that from both the accused, quantity of 2 kg, 630 grams of Ganja was jointly recovered, which is admittedly not a commercial quantity, but also not a small quantity. As per the notification - SO 1055 (E) dated 19.10.2001, at srl. no.23, the quantity of 1000 gram Ganja is a small quantity whereas quantity of 20 kg. Ganja is a commercial quantity. Therefore, it cannot be disputed that the quantity of 2 kg, 630 gram of Ganja found from both the accused was neither a small quantity nor a commercial quantity. Therefore, trial Court ought to have convicted and sentenced both the accused under Section 20(b)(ii)(B) of the NDPS Act. However, the trial Court has under wrong premises, that 100 gram Ganja is a small quantity and 1 kg is a commercial quantity, has convicted both the accused under Section 20(b)(ii)(C) of the NDPS Act, which is a

mistake apparent on the face of it.

8. So far as possessing Ganja of less than commercial quantity is concerned, the punishment under Section 20(b)(ii)(B) may extend to 10 years and with fine which may extend to Rs.1 lac.

9. In view of the above, according to us, since both the accused were found with the contraband article Ganja weighing 2 kg 630 grams which is neither a small quantity nor a commercial quantity, the trial Court ought to have convicted and sentenced both the accused under Section 20(b)(ii)(B) of the NDPS Act, and in that view of the matter, if both the accused are sentenced to suffer RI of 4 years and fine of Rs.50,000/-, i.d. to undergo RI for 3 months, the same would meet the ends of justice.

10. Seen in the above context, this appeal deserves to be allowed partly by altering the conviction recorded under Section 20(b)(ii)(C) of the NDPS Act into 20(b)(ii)(B) of the NDPS Act and accordingly sentence is also deserved to be reduced as observed in the foregoing paragraph.

11. For the foregoing reasons, both the appeals succeed in part and accordingly they are partly allowed. While maintaining the

order of conviction recorded against both the accused for commission of the offence under the NDPS Act, conviction recorded under Section 20(b)(ii)(C) of the NDPS Act, is altered into conviction recorded under Section 20(b)(ii)(B) of the NDPS Act and consequently, both the accused are sentenced to suffer RI for 4 years and fine of Rs.50,000/-, i.d. to undergo RI for 3 months. Both the appeals are disposed of accordingly.

12. Mr. R.M.Agarwal, learned advocate of the appellant in both the appeals, states that since both the accused have undergone total period of sentence of more than 4 years and 4 months, therefore, appropriate order, directing the jail authorities to release both the accused may be passed.

13. Mr. K.T.Dave, learned APP for the respondent – State of Gujarat, on the basis of the jail remark sheet, endorsed by saying that both the accused have undergone total period of sentence of 4 years, 3 months and 25 days.

14. In view of the statement made by Mr. R.M.Agarwal, learned advocate of the appellant in both the appeals, which is endorsed by Mr. K.T.Dave, learned APP for the respondent – State of Gujarat, at the bar, as

per the jail remark sheet, since both the accused have undergone total period of sentence of 4 years, 3 months and 25 days, jail authorities are directed to set both the accused at liberty forthwith, if their presence is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

Jayanti*